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PLEADING — EQUITABLE REPLY TO A LEGAL DEFENSE IN THE FEDERAL COURTS. — The plaintiff sued at law on a contract in a federal court. The defendant pleaded a settlement. The plaintiff's replication set up fraud. The defendant demurred to the replication on the ground that as a matter of procedure the plaintiff's only remedy was a bill in equity to set aside the settlement. The Judicial Code, as amended March 3, 1915, provides that "in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. . . . In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication . . ." (§ 274b; 1918 U. S. COMP. STAT., 1251b.) *Held*, that the demurrer be overruled. *Plews v. Burrage*, 274 Fed. 881 (1st Circ.).

In civil actions the district courts, under the Conformity Act, follow the general practice of the courts of the state where they are held. See 1918 U. S. COMP. STAT., § 1537. In many states equitable defenses and replications in actions at law have been expressly permitted by statute. See 1913 WIS. STAT., § 2657; 1913 MINN. GEN. STAT., § 7756; 1918 CONN. GEN. STAT., §§ 5554, 5636. This was the practice in the state where the action in the principal case was brought. See 1920 MASS. GEN. LAWS, c. 231, § 35. But before the Act of March 3, 1915 the state practice was not followed so as to permit an equitable defense to be pleaded in an action at law. *Scott v. Armstrong*, 146 U. S. 499; *McManus v. Chollar*, 128 Fed. 902 (5th Circ.). This was in accord with the rule in the Supreme Court that the distinction as to procedure between law and equity must be observed. *Scott v. Armstrong*, *supra*. See *Bennett v. Butterworth*, 11 How. (U. S.) 669, 675. In a very technical ruling the Circuit Court of Appeals of another circuit has, contrary to the present decision, limited the application of the Act of 1915 to equitable pleas. *Keatley v. U. S. Trust Co.*, 249 Fed. 296 (2d Circ.). It is submitted that that is too narrow a construction of the act, and that the decision in the principal case is more in harmony with its purpose and intention, namely, to avoid multiplicity of suits. See *Manchester St. Ry. Co. v. Barrett*, 265 Fed. 557 (1st Circ.). See Hand, J., dissenting, in *Keatley v. U. S. Trust Co.*, 249 Fed. 296, 299 (2d Circ.). And see 3 FOSTER, FEDERAL PRACTICE, 6 ed., § 454g. The decision of the court seems all the more reasonable in view of the fact that the plaintiff could here have amended in this very action, and proceeded. See 1918 U. S. COMP. STAT., § 1251a.

PLEDGES — DELIVERY TO CREATE A FUTURE PLEDGE — ASSIGNMENT OF DEBT TO ONE PERSON AND OF PLEDGE TO ANOTHER. — The plaintiff delivered jewels to A, who was to keep them as security if a loan should later be made by him and accepted by the plaintiff. A pledged the jewels to the defendant, B, to secure a loan to himself of £1000. The defendant had no notice that they did not belong to A. A then loaned the plaintiff money and took her note to himself or order for £600, with her written statement of the deposit of the jewels as security. The plaintiff knew nothing of the transactions with the defendant. A borrowed £300 from one C and deposited the plaintiff's note as security. The plaintiff then, with notice of the defendant's claim, paid C £400 on account of the note. Making no tender whatsoever to the defendant, she sued for the return of the jewels. *Held*, that judgment be entered for the defendant. *Blundell-Leigh v. Attenborough*, [1921] 3 K. B. 235 (C. A.).

For a discussion of the principles of the law of pledges involved in this case see NOTES, *supra*, p. 318. The questions of estoppel considered in the case will be treated in a subsequent number of this REVIEW.

SPECIFIC PERFORMANCE — GENERAL NATURE AND SCOPE OF EQUITABLE RELIEF — UNCERTAINTY IN CONTRACT TO CONVEY SPECIFIED AMOUNT OF LAND TO BE SELECTED BY VENDOR FROM LARGER TRACT. — The defendant

company contracted to convey to the plaintiff's testator 640 acres out of the land it should hold at a certain time, of the same average probable value per acre as the remaining lands it should then hold, to be selected by the agent of the defendant company. At the time for performance the defendant company owned 6,320 acres. The plaintiff, who has fully performed, appeals from a decree dismissing his suit for specific performance. *Held*, that the decree be reversed. *Williams v. Cow Gulch Oil Co.*, 270 Fed. 9 (8th Circ.).

Because of practical considerations, it is generally recognized that a greater degree of certainty is necessary for specific enforcement of a contract than for enforcement at law. See POMEROY, SPECIFIC PERFORMANCE, § 159; FRY, SPECIFIC PERFORMANCE, 6 ed., § 380. On the ground of uncertainty, the weight of authority denies specific performance of a contract to convey a certain amount of land to be selected by the vendor out of a larger tract. *Rampke v. Beuhler*, 203 Ill. 384, 67 N. E. 796; *Auer v. Mathews*, 129 Wis. 143, 108 N. W. 45. See also *Pearce v. Watts*, L. R. 20 Eq. 492. There is, however, respectable authority to the contrary. *Fleishman v. Woods*, 135 Cal. 256, 67 Pac. 276. *Cf. Jenkins v. Green (No. 1)*, 27 Beav. 437. The minority view, with which the principal case accords, seems more reasonable. The requirement of certainty, coming largely from history, has been overemphasized. See Roscoe Pound, "Progress of the Law — Equity," 33 HARV. L. REV. 420, 434; 3 WILLISTON, CONTRACTS, § 1424. If the fact of performance can be determined by objective standards, there should be no objection to ordering the defendant to perform, choosing from the alternatives which the contract gives him. *Jones v. Parker*, 163 Mass. 564, 40 N. E. 1044. In the principal case, moreover, the plaintiff had already performed. This circumstance makes a court of equity more ready to give relief. *Sanderson v. Cockermouth & Worthington Ry. Co.*, 11 Beav. 497, aff'd, 2 H. & T. 327; *South Eastern Ry. Co. v. Associated Portland Cement Manufacturers*, [1910] 1 Ch. 12. See also, *Guntion v. Carroll*, 101 U. S. 426; *Lowe v. Brown*, 22 Ohio St. 463. The court properly does not even mention certain entirely unfounded *dicta* that the requisite of certainty is greater when some one other than the original party to the contract is suing. See *Odell v. Morin*, 5 Ore. 96, 98; *Montgomery v. Norris*, 1 How. (Miss.) 499, 506.

STATES — LIABILITIES ARISING FROM GOVERNMENTAL INDUSTRIES. — A North Dakota statute provides that the state shall establish a bank, to be financed by sale of state bonds, to be operated by a state Administrative Commission. (1919 LAWS OF N. D., c. 147.) Provision is made for bringing civil actions against the "State, Doing Business as the Bank of North Dakota." (*Ibid.*, § 22.) The plaintiff, a depositor, seeks to garnish credits of the bank. The remedy of garnishment is not by the statute made applicable to the state. From an order refusing to vacate garnishment proceedings, the defendant appeals. *Held*, that the order be affirmed. *Sargent County v. State, Doing Business as the Bank of North Dakota*, 182 N. W. 270 (N. D.).

For a discussion of the principles involved, see NOTES, *supra*, p. 335.

TAXATION — INHERITANCE TAXES — TRANSFERS IN CONTEMPLATION OF DEATH. — The plaintiff seeks to recover taxes paid under protest under the provision of the federal inheritance tax statute taxing conveyances in contemplation of death. (39 STAT. AT L. 777; U. S. COMP. ST., § 6336½c.) The trial court refused to charge the jury that "in contemplation of death" refers only to the "apprehension which arises from some existing condition of body or some impending peril" but instructed that the transfer is "in contemplation of death if the expectation or anticipation of death in either the immediate or reasonably distant future is the moving cause of the transfer." *Held*, that there was no error. *Shwab v. Doyle*, 269 Fed. 321 (6th Circ.).